No. 93-609

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Supreme Court of the United States

October Term 1993

FIRST REPUBLICBANK CORPORATION,
IFRB CORPORATION,
MORGAN STANLEY & CO. INCORPORATED,
GOLDMAN, SACHS & CO.,
ERNST & YOUNG,
SALOMON BROTHERS INC,

Petitioners,

v.

PACIFIC MUTUAL LIFE INSURANCE COMPANY,

Respondent.

REPLY BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
REASONS FOR GRANTING THE WRIT	1
CONCLUSION	6

TABLE OF CITATIONS

	PAGE
Armstrong v. *Norwest Bank*, 964 F.2d 797 (8th Cir. 1992) .	3
Aunyx Corp v. *Canon Decisions U.S.A., Inc.*, 978 F.2d 3 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 1416 (1993)	3
Axel Johnson v. *Arthur Andersen & Co.*, 1993 U.S. App. LEXIS 249054 (2d Cir. Sep't 27, 1993).....	5
Chase Sec. Corp. v. *Donaldson*, 325 U.S. 304 (1945)	5
Clifton v. *Attorney General*, 997 F.2d 660 (9th Cir. 1993)..	3
Federated Dep't Stores, Inc. v. *Moitie*, 452 U.S. 394 (1981)	3
Georgia Ass'n of Retarded Citizens v. *McDaniel*, 855 F.2d 805 (11th Cir. 1988), *cert. denied*, 490 U.S. 1090 (1989)	4
Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792).....	2
Hodges v. *Snyder*, 261 U.S. 600 (1923)	3,4
Jago v. *Van Curen*, 454 U.S. 14 (1981)	4
Johnston v. *Cigna Corp.*, 1993 WL 500842 (10th Cir. Dec. 8, 1993).....	2,4,5
Logan v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982)	4

	PAGE
Plaut v. *Spendthrift Farms, Inc.*, 1 F.3d 1487 (6th Cir. 1993), *pet. for rehearing denied*, No. 92-5591 (6th Cir. Oct. 14, 1993).....	1,2,3,5
Treiber v. *Katz*, 796 F.Supp. 1054 (E.D. Mich. 1992)	5
United States v. *Kubrick*, 444 U.S. 111 (1979).....	4
Wilson v. *Lynaugh*, 878 F.2d 846 (5th Cir.), *cert. denied*, 493 U.S. 969 (1989)	3,4

Constitutional Provisions, Statutes and Rules

U.S. Const. art. III	4
Securities Exchange Act of 1934 § 27A, 15 U.S.C. § 78aa-1.....	2,3
Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b)	5
Fed. R. Civ. P. 41(b)	4

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

REASONS FOR GRANTING THE WRIT

The Solicitor General has requested that this Petition be granted "[b]ecause the Fifth and Sixth Circuits have rendered conflicting decisions on the issue in the case, because the Sixth Circuit's decision in *Plaut*[1] invalidates an act of

1. *Plaut* v. *Spendthrift Farms, Inc.*, 1 F.3d 1487 (6th Cir. 1993), *pet. for rehearing denied*, No. 92-5591 (6th Cir. Oct. 14, 1993).

Congress and because the constitutional issue arises in a number of additional cases of which we are aware." Brief for the United States at 5. The Solicitor General also notes that these issues "are squarely presented by the present [P]etition, and we are unaware of any procedural obstacle in this case that would prevent the Court from resolving those issues here." *Id.* at 6.[2]

Following the filing of the Government's brief, the Tenth Circuit issued its decision in *Johnston* v. *Cigna Corp.*, 1993 WL 500842 (10th Cir. Dec. 8, 1993), holding that Section 27A(b), as applied to final judgments entered prior to the enactment of § 27A, violates the Constitution. Widening the direct split among the circuits over the constitutional issues raised in the Petition, the *Johnston* court specifically followed *Plaut* and rejected the reasoning of the Fifth Circuit in this case. The *Johnston* court held that the "principle from *Hayburn's Case*[3] that '[t]he federal judiciary will not have its decision in a case frustrated by having it subjected to revision, suspension, modification, or other review by the executive or legislative branches,'" *id.* at *9 (citation omitted) "remains as alive today as it was when our nation was founded." *Id.* at *10.[4]

In marked contrast, the brief of Respondent Pacific Mutual Life Ins. Co. ("Pacific Mutual") in Opposition to Petition for a Writ of Certiorari ("Resp. Br.") creates a statute that never existed, defends it (unsuccessfully) against an attack never

2. Petitioners incorporate by reference the Rule 29.1 statement set forth in the Petition for Certiorari.

3. 2 U.S. (2 Dall.) 409 (1792).

4. The position of the dissent in *Johnston* also demonstrates the split in the lower courts. The dissent explicitly rejected what it considered to be the "forceful decision" in *Plaut* in favor of what it termed the "stronger reasoning" of *Pacific Mutual*. 1993 WL 500842, at *13 (Holloway, J., dissenting).

mounted, and concludes that, because the fictitious statute might have saved Pacific Mutual's federal claim, this case is not worthy of certiorari. Only the barest reference is made to *Plaut*; none of the relevant precedents cited by *Plaut*, or Petitioners, is mentioned, let alone distinguished; and the very constitutional issue that creates the split between the Fifth and Sixth Circuits, separation of powers, is all but ignored.

Rather than addressing whether this issue is worthy of certiorari, the heart of Pacific Mutual's opposition is its assertion that without implicating any constitutional concerns Congress could have legislated an "entirely new cause of action" and "given it as long a statute of limitations as it desired." Resp. Br. 2. Indeed, Pacific Mutual contends that this is essentially what Section 27A achieved and Congress' use of the "reinstatement" mechanism was merely "linguistic shorthand."

To begin with, Congress did *not* pass this hypothetical legislation and that is the end of the argument. And, in any event, Pacific Mutual has acknowledged that even new legislation, creating a new cause of action, cannot overturn a judgment that "has in some fashion awarded ... some other valuable property right, such that a retroactive application of a newly enacted statute would operate to deprive the litigant of an actual property right." Resp. Br. 8 (citing *Hodges* v. *Snyder*, 261 U.S. 600, 603-04 (1923)).[5]

5. Quite apart from constitutional barriers, Congressional adoption of the hypothetical statute posited by Pacific Mutual would not have affected the finality of the judgment of dismissal in petitioners' favor, the preclusive effect of which would have precluded any new suits arising out of the same underlying transactions, even if based on a "different legal theory or source of law." *Aunyx Corp.* v. *Canon U.S.A., Inc.*, 978 F.2d 3, 8 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 1416 (1993); *Armstrong* v. *Norwest Bank*, 964 F.2d 797, 802 (8th Cir. 1992). As a general rule, changes in law do not prevent the application of *res judicata*. *Clifton* v. *Attorney General*, 997 F.2d 660, 663 (9th Cir. 1993); *Wilson* v. *Lynaugh*, 878 F.2d 846, 850 (5th Cir.), *cert. denied*, 493 U.S. 969 (1989). *See Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981) (*res judicata* effect not altered by the fact that judgment "rested on a legal principle subsequently overruled in another case"). The primary exception to this

Pacific Mutual contends, however, that Petitioners are not entitled to the due process protection accorded by *Hodges* and other cases because the judgment in Petitioners' favor on limitations period grounds conferred no " 'award of damages, costs, or the right to receive any property.' " Resp. Br. 7.[6] If accepted, this assertion — that no final judgment of dismissal is worthy of Article III or due process protection — would make innumerable decisions of the federal courts vulnerable to legislative review. Accordingly, regardless of its merits, Respondent's articulation of the issue establishes that this case is worthy of certiorari.

Respondent's position is also without merit. Logic and precedent establish that the right not to pay money is as valuable as the right to receive money.[7] Indeed, as the Fifth

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rule — for civil rights cases (*Wilson*, 878 F.2d at 850) — does not apply here.

6. Respondent cites *Jago* v. *Van Curen*, 454 U.S. 14, 17 (1981), which found that an inmate's due process rights were not violated by rescission without an opportunity for hearing, based on fraud by the inmate, of a preliminary decision to grant parole. *Jago* is thus easily distinguishable from this case, which involves property interests vested in the final judgment of an Article III Court.

7. Judgments of dismissal convey due process rights even though the winning party receives no monetary award. *See Georgia Ass'n of Retarded Citizens* v. *McDaniel*, 855 F.2d 805, 812 (11th Cir. 1988) ("Like an award of damages or an award of costs, the right to receive — and conversely, the *right not to pay* — attorney's fees, is, in the parlance of these cases, a private right not subject to divestiture") (emphasis supplied), *cert. denied*, 490 U.S. 1090 (1989); *see also Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) (due process clause protects "civil litigants who seek recourse in the courts ... as defendants hoping to protect their property"). And judgments based on limitations grounds are substantive. *See Johnston*, 1993 WL 500842, at *7 ("A decision by a federal court adjudging a claim to be time barred is a final judgment on the merits and once a claim is so adjudged, Congress cannot direct the court to reopen the judgment."); Fed. R. Civ. P. 41 (b) (limitations dismissal operates as adjudication on the merits); *see also United States* v. *Kubrick*, 444 U.S. 111, 117 (1979) (limitations periods convey " 'the right to be free of stale claims' ").

Circuit acknowledged, Petitioners have shown that the final judgment itself is "a species of property right." *First Republicbank Corp.* v. *Pacific Mutual Life Ins. Co.*, 997 F.2d 39, 51 n.14 (A-25); *see also Johnston* v. *Cigna Corp.*, 1993 WL 500842 at *5 (10th Cir. Dec. 8, 1993) ("once rights are fixed by judgment, they are a form of property over which the legislature has no greater power than it has over any other form of property") (citing *Axel Johnson* v. *Arthur Andersen & Co.*, 1993 U.S. App. LEXIS 24954, at *16 (2d Cir. Sept. 27, 1993)).[8] Thus, regardless of its basis, the judgment itself triggers constitutional protection, as this Court recognized in *Chase Sec. Corp.* v. *Donaldson*, 325 U.S. 304, 314 (1945), the decision upon which Pacific Mutual principally relies.[9]

Accordingly, none of Pacific Mutual's arguments is sufficient to overcome the showing by Petitioners, supported by the Solicitor General, that the issues presented by the Petition are worthy of certiorari.

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8. Moreover, as Pacific Mutual concedes, the final judgment of the district court provided Petitioners with the tangible right to relief from exposure to Section 10(b) claims under the Securities Exchange Act of 1934 (which as a matter of law cannot be heard in state court). *See* Resp. Br. at 8.

9. *Id.* at 310 (limitations periods may be changed because case was "*not* one where a defendant's statutory immunity from suit had been finally adjudged so that legislative action deprived it of a final judgment in its favor") (emphasis supplied); *id.* at 316 (no constitutional right "before final adjudication"). *See also Johnston*, 1993 WL 500842 at *6 (*Chase* did not involve a final judgment); *Plaut*, 1 F.3d at 1496 ("Congress may change an established time bar ... But where the courts have adjudged a claim to be time-barred, Congress cannot compel the courts to reopen a settled judgment.") (discussing *Chase*); *Treiber* v. *Katz*, 796 F. Supp. 1054, 1061 (E.D. Mich. 1992) ("Even though Defendants do not have vested rights in a particular statute of limitations, Defendants do have vested rights in this Court's judgment dismissing Plaintiff's Section 10(b) claims.") (discussing *Chase*).

CONCLUSION

The Petition should be granted to address the fundamental separation of powers and due process questions posed by this case.

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Respectfully submitted,

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